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ABSTRACT

This report reviews and compares the legal rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. The first and second sections detail the statutory framework of the laws and legal requirements pertaining to eligibility, identification, and local and state program responsibility, including provisions on the population protected and age ranges. Section 3 describes the provisions on evaluations and evaluation safeguards in the two laws, including language affecting notice and consent for evaluation, the nature of the evaluation, evaluation methods, independent evaluations, interpretation and use of evaluation results, and review and reevaluation. Section 4 focuses on provisions in the two laws that address programming and placement decisions and provides information on the requirements of individualized education programs and least restrictive environment. Requirements governing parental participation are also described. The final section deals with parent challenges to school decisions and includes a review of provisions on notice, complaints, hearings, appeals, civil action, child's placement status during administrative and judicial proceedings, remedies, and attorneys' fees. Court decisions are cited throughout the legal review. (CR)

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OVERVIEW:

EDUCATIONAL RIGHTS OF CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973[1]

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I. Statutory Framework

A. The Individuals with Disabilities Education Act or "IDEA"

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1401 et seq.--formerly known as the Education for All Handicapped Children Act or "EAHCA," then the Education of the Handicapped Act or "EHA" and often referred to as P.L. 94-142--provides for federal aid to reimburse state and local education agencies for a portion of the cost of providing special education and related services to students who need it.

No state or local education agency can receive such funding unless the state education agency has submitted a plan covering all local education agencies within the state. Under this plan, education agencies are required to provide each disabled child with a free public education specifically tailored to meet his or her individual needs. Also required are procedural due process safeguards in evaluation, placement decisions, hearings, and appeals, as well as safeguards for student records related to this process.

IDEA is more than a funding statute. For state and local education agencies, it is both a source of funds and a source of obligations. Moreover, the Act guarantees parents and guardians of children with disabilities the right to secure the provision of a free appropriate public education through both administrative and judicial remedies. 20 U.S.C. §1412(b)(2),(e)(4).

B. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 is a civil rights statute designed to prohibit discrimination on the basis of disability in federally-funded activities. Section 504 as amended provides in relevant part that:

"No otherwise qualified individual with a disability in the United

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States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving federal financial assistance..."

29 U.S.C. §794(a). Because virtually all local schools and school districts receive federal funds of some sort, §504 provides an additional tool for assuring that school-age children with disabilities receive the education to which they are entitled.

The U.S. Department of Education regulations implementing §504 in the preschool, elementary and secondary education context operate in two basic ways: (1) by generally prohibiting certain practices as discriminatory ones, see 34 C.F.R. §104.4(b), and (2) by compelling school districts and other recipients to take certain affirmative steps to ensure that students with disabilities receive an appropriate public education. See 34 C.F.R. §§104.31-39. As discussed in further detail below, the latter include requirements for identification, provision of free appropriate education, evaluation and placement, procedural safeguards, and non-academic services.

II. Eligibility, Identification and Program Responsibility

A. Population Protected

1. IDEA

For purposes of IDEA, the term "children with disabilities" means

"...children...with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities...who by reason thereof need special education and related services."

20 U.S.C. §1401(1) (emphasis added). At a state's discretion, "children with disabilities" may also include 3 to 5 year olds who are "(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in...physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (ii) who, by reason thereof need special education and related services." Id.

IDEA does not allow for the possibility that some children are too severely disabled to be served: states and school systems may not refuse to provide educational services on the ground that a child is too severely disabled to benefit from them. Timothy W. v. Rochester School District, 875 F.2d 954 (1st Cir. 1989), cert. denied, 110 S. Ct. 519 (1989).

2. §504

For purposes of §504, a protected "individual with a disability" is one

"who i) has a physical or mental impairment which substantially limits one or more major life activities; ii) has a record of such impairment; or iii) is regarded as having

such an impairment."

29 U.S.C. 706(8)(b); 34 C.F.R. §104.3(j)(1).[2] Virtually all children who meet IDEA eligibility criteria will fall within this definition and so be protected by §504 as well. Like IDEA, the §504 regulations entitle children to a free appropriate public education, "regardless of the nature or severity of the person's handicap." 34 C.F.R. §104.33(a).

The §504 definition of an "individual with a disability," however, is broader than the operative IDEA definition. A Child who does not fall within the IDEA definition of "children with disabilities" may nevertheless be an "individual with a disability" protected by §504 and its implementing regulations.[3]

Section 504 protects only "otherwise qualified" individuals from disability-based discrimination. For purposes of public preschool, elementary and secondary school services, an "individual with handicaps" is "otherwise qualified," and thus protected by §504, if he or she is: (1) of any age during which nonhandicapped persons are provided such services, (2) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (3) someone IDEA requires the state to provide with a free appropriate education. 34 C.F.R. §104.3(k)(2).

B. Age Ranges

States which accept federal monies under IDEA are required to serve all children with disabilities ages 3 through 21 years of age unless, with respect to the age group 3 through 5 and 18 through 21, this requirement is inconsistent with a state law or practice or a court order. 20 U.S.C. §1412(2)(B); 34 C.F.R. §300.300. Amendments to IDEA have strengthened the financial incentive for states to serve three through five-year-olds by gradually increasing the federal funding available to states to serve this group. As of the 1991-92 school year, participating states must serve all three through five-year-olds with disabilities, or lose federal funding for services for this age group. 20 U.S.C. §1419.

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[2] The term "physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the neurological, musculoskeletal, sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine systems, as well as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. §104.3(j)(2)(i). "Major life activities" means activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. §104.3(j)(2)(ii).

[3] For example, a child who has an "other health impairment," such as epilepsy or AIDS, but who does not need special education as a result is not a "child with disabilities" under IDEA. He or she would nonetheless be protected by §504. In addition, a child who does not have any of the kinds of disabilities required for IDEA eligibility may nonetheless have an impairment--or be regarded as having an impairment or have a record of an impairment--covered by §504.

C. Identification of Students with Disabilities

Both IDEA and the regulations implementing §504 impose obligations upon state education agencies and local school districts to identify, locate, and evaluate children with disabilities. See 20 U.S.C. §§1412(2)(C) and 1414(a)(1)(A); 34 C.F.R. §§300.128 and 300.220; 34 C.F.R. §104.32.

D. Local and State Program Responsibility 20 U.S.C. §1412(6), §1414, 34 C.F.R. 330.220-.240, 300.600; 34 C.F.R. 104.33

Under IDEA, local school districts are responsible for providing and maintaining appropriate special education programs and placements for children with disabilities in accordance with standards established by the state board of education. In general, a local school district may meet this responsibility in a variety of ways including by providing the necessary programs and related services itself; by arranging for the provision of programs and services by cooperative agreement or contract with one or more other local school districts, or with a county or joint vocational school district; or by arranging through cooperative agreement or contract with a non-profit agency for the provision of related services. See 20 U.S.C. §1411.

The state educational agency is ultimately responsible for a) insuring that all educational programs for children with disabilities, including those of local educational agencies and other state agencies, meet the requirements of federal law; b) monitoring and evaluating such programs and providing written complaint procedures; c) correcting deficiencies in program operations that are identified through monitoring and evaluation; d) insuring evaluations of the effectiveness of each program in meeting the needs of children with disabilities, including evaluation of IEPs at least once every three years; e) insuring proper disbursement of and accounting for federal funds paid to the state under the IDEA; and f) making annual reports on children served. 20 U.S.C. §§1411(a)(3), 1413(a)(11) and 1412(6); 34 C.F.R. §§300.146, 300.600, and 300.750-.754; 34 C.F.R. §§76.101(e)(1)-(7) and 76.780-.783.

III. Evaluations and Evaluation Safeguards

A. Evaluations Required

Under both IDEA and the §504 regulations, all children with disabilities must receive full and individualized evaluations of their needs. 20 U.S.C. §§1412(2)(C) and 1414(a)(1)(A); 34 C.F.R. §§300.128(a)(1) and §300.220; 34 C.F.R. §104.32. Such an evaluation must be conducted before any action is taken with respect to initial placement in a special education program. 34 C.F.R. §300.531; 34 C.F.R. §104.35(a).

B. Notice and Consent for Evaluation

Both IDEA and §504 require that *notice* be provided to parents or guardian whenever the school proposes to initiate or change, or refuses to initiate or change, the identification or evaluation of the child. 20 U.S.C. §1415(b)(1)(C); 34 C.F.R. §300.504(a); 34 C.F.R. §104.36. IDEA regulations include requirements designed to insure that the notice contains a full explanation of the proposed actions and procedural safeguards available to the parent, is

written in understandable language, and is provided in the parent's native language or other primary mode of communication. See 20 U.S.C. §1415(b)(1)(D); 34 C.F.R. §300.505.

Further, under IDEA parental *consent* must be obtained before conducting an initial evaluation. 34 C.F.R. §300.504(b)(1)(i). For the definition of "consent," see 34 C.F.R. §300.500, which attempts to insure that it is truly informed and voluntary. For procedures where the parent refuses to consent, see 34 C.F.R. §300.504(c).

C. Nature of the Evaluation

The evaluation is carried out by a multidisciplinary team. It must assess the child in all areas related to the suspected disability(ies) including, where appropriate, various physical, emotional, perceptual, mental, communicative, and other abilities. 34 C.F.R. §300.532(e)-(f); see also 34 C.F.R. §104.36(c) (regarding §504 requirements). Decisions cannot be based upon a single test or procedure, and the evaluation materials must be tailored to assess specific areas of educational need, not just general "IQ." 34 C.F.R. §300.532; see also 34 C.F.R. §104.35(b) (regarding §504). Additional procedures for evaluating children believed to have specific learning disabilities appear at 34 C.F.R. §§300.7(b)(10) and 300.540-543.

D. Valid, Unbiased Testing and Evaluation Methods

The evaluation procedures must have been validated for the specific purpose for which they are used and must be administered properly by trained persons. 34 C.F.R. §300.532(a)(2)(3); 34 C.F.R. §104.35(b)(1). They must also be selected and used in a way which accurately reflects what the materials purport to measure, rather than merely reflecting the child's impairments. 34 C.F.R. §300.532(c); 34 C.F.R. §104.34(b)(3).[4]

IDEA requires that all tests and other evaluation materials be provided in the child's native language or other mode of communication, unless clearly not feasible. 20 U.S.C. §1412(5)(C); 34 C.F.R. §300.532(a)(1). In addition, the materials and procedures must be selected and administered so as not to be racially or culturally discriminatory. 20 U.S.C. §1412(5)(C); 34 C.F.R. §300.530(b); see also Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979), aff'd in part and rev'd in part, 793 F.2d 969 (9th Cir. 1984); for a discussion of racially biased testing in the context of §504 and Title VI of the Civil Rights Act 1964, see Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403 (11th Cir. 1985).[5]

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[4] For example, a written test to measure intellectual abilities would not be valid for a student whose perceptual problems prevented him/her from accurately perceiving the words on the page.

[5] In a 1975 memorandum the then Department of Health, Education and Welfare stated that Title VI of the Civil Rights Act of 1964 may be violated where disproportionate impact on a particular racial or national origin group is coupled with failure to adopt and implement certain basic criteria, procedures, and programs in special education--including many of the procedures discussed herein. See HEW Memorandum, Identification of Discrimination in the Assignment of Children to Education Programs, (August 1975) (Clearinghouse No. 16,721).

E. Independent Evaluations

The parent has the right under IDEA to obtain an independent educational evaluation of the child, when s/he disagrees with an evaluation conducted or obtained by the school. 20 U.S.C. §1415(b)(1)(A); 34 C.F.R. §300.503. The independent evaluation will be at pubic expense unless the school initiates a hearing and demonstrates that its own evaluation is appropriate. 34 C.F.R. §300.503(b).

F. Interpretation and Use of Evaluation Results

Evaluation results will be used first to determine whether the child has a disability and meets IDEA and/or §504 eligibility criteria. If so, they will then be used to develop educational goals and objectives, design special education instruction, decide upon the educational setting in which the child will be placed, and determine what kind of related aids and services will be necessary.

School systems may not use any single test or evaluation tool–such an IQ test–as the sole basis for determining whether a child has a disability and needs special education, or for determining what will constitute an appropriate educational program for him or her. 34 C.F.R. §300.532(d); 34 C.F.R. §104.35. In interpreting and using evaluation results, school systems must:

- o draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior;[6]
- o insure that information obtained from all of these sources is carefully documented and considered; and
- o insure that people knowledgeable about the meaning of the evaluation data participate in decisions regarding the child's educational program.

34 C.F.R. §300.533(a); 34 C.F.R. §104.35(c).[7]

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[6] The required social and cultural information should include information concerning health (including sleep, nutrition and housing); family structure, educational background and native language; access to books; exposure to the kind of information and experiences that tests assume, and to test administrators. See American Educational Research Assn., American Psychological Assn. and National Council on Measurement in Education, Standards for Educational and Psychological Testing (1985).

[7] Many of the tests and other procedures used in educational evaluations have been criticized by educators, psychologists, researchers and others as invalid for the purposes they are intended to serve, as racially or culturally biased, or as inaccurate for other reasons. Tests or other evaluation tools appropriate for some children may be inappropriate–and produce misleading results–for others. A great deal has been written on this subject, and advocates should be prepared to scrutinize this issue carefully, particularly if the parent's assessment of the child differs from that of the evaluation team and/or the child is a member of a racial, ethnic or linguistic minority.

G. Review and Reevaluation

Regular review and evaluation is important to insure that students in special education programs in fact benefit from them and are not unnecessarily and permanently locked into them. This is recognized in IDEA and its regulations. See 20 U.S.C. §§1412(4) and 1414(a)(5); 34 C.F.R. §§300.130 and 300.235.

As noted above and discussed in further detail below, each child with disabilities must be provided with an individualized education program ("IEP") containing, among other things, "appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis, whether instructional objectives are being achieved." 20 U.S.C. §1401(19)(E); 34 C.F.R. §300.346(e). In addition, IEPs must be reviewed and revised at least once per year at a meeting convened for that purpose and fulfilling statutory and regulatory requirements regarding parental participation, meeting participants and procedural protections. 20 U.S.C. §1412(4), §1414(a)(5); 34 C.F.R. §300.343(d); 300.534(a); §300.552(a)(1).

Finally, IDEA requires that a full reevaluation of the child be conducted "every three years or more frequently if conditions warrant or if the child's parents or teacher requests an evaluation." 34 C.F.R. §300.534(b). The §504 regulations require "periodic reevaluation of students who have been provided special education and related services," 34 C.F.R. §104.35(d), as well as evaluations prior to any "significant change in placement." 34 C.F.R. §104.35(a).

IV. Programming and Placement Decisions

A. "Free Appropriate Public Education"

IDEA requires each state to adopt and implement a policy which insures a "free appropriate public education" for all children with disabilities within the state. 20 U.S.C. §1412(1) and (2)(B); 34 C.F.R. §300.121. The §504 regulations impose a similar requirement, providing that:

> "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."

34 C.F.R. 104.33(a).

1. IDEA

Under IDEA, a "free appropriate public education" means "special education and related services," including appropriate preschool, elementary, or secondary school education, provided in conformity with the required individualized education program. 20 U.S.C. §1401(18); 34 C.F.R. §300.5. "Special education," in turn, is defined as:

> "...**specially designed instruction**, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including (A) instruction

> conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education."

20 U.S.C. §1401(a)(16) (emphasis added); see also 34 C.F.R. §300.17.

Note that under this definition, "special education" is an instructional technique, not a place: once instruction for an individual child has been tailored as required to address his or her needs it may, again depending upon the child's needs, be provided in a variety of settings including a regular education classroom. Thus a school district cannot fulfill its obligation to provide "special education" by, for example, automatically placing a child with a particular disability in a particular classroom or program designated to serve that group. See, e.g., Board of Education of the County of Cabell v. Dienelt, 1986-87 EHLR DEC. [Education for the Handicapped Law Reports Decisions] 558:305, :308 (S.D.W.Va. 1987) (school board failed to provide free appropriate public education when it attempted to place student with learning disabilities in its "generalized special education program without reference to the child's individualized needs"), aff'd. per curiam, 843 F.2d 813 (4th Cir. 1988). In addition to circumventing IDEA requirements, such conduct constitutes illegal discrimination under §504. See 34 C.F.R. §104.4(b)(1)(iv) (prohibiting recipients of federal funds from providing different or separate services to people with disabilities or any category of people with disabilities unless such treatment is necessary to provide them services as effective as those provided to non-disabled people).

For purposes of IDEA, "related services" are defined as:

> "...transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with disabilities to benefit from special education, and includes the early identification and assessment of disabling conditions in children."

20 U.S.C. §1401(a)(17); see also 34 C.F.R. §300.16. The statutory list of related services is not exhaustive; if a child needs a particular service in order to benefit from special education and the service is a developmental, supportive or corrective one, it is also a "related" one and should be provided regardless of whether it is expressly listed in IDEA or its regulations. Comment to 34 C.F.R. §300.16. For some children, for example, a part or full time aide might constitute a required related service, see, e.g., Thornock v. Boise Independent School District #1, 115 Idaho 466, 767 P.2d 1241 (1988), cert. denied, 109 S.Ct. 2069 (1989), as might certain equipment or assistive technology, such as a computer or tape recorder.[8]

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[8] Depending upon a student's particular circumstances, a school system might be required to provide a computer or other assistive technology devices, or assistive technology services, as "special education," as a "related service" or as a "supplementary aid or service" to facilitate his or her education in the regular education setting pursuant to IDEA's least restrictive environment requirements. 34 C.F.R. §300.308 (1993); see also Inquiry of Goodman, 16 EHLR 1317 (OSEP 8/10/90).

2. §504

The free appropriate public education required by §504 may consist of "regular or special education and related aids and services." 34 C.F.R. §104.33(b) (emphasis added). The §504 regulations do not define these terms, but do provide that special education and related services developed and delivered in accordance with IDEA dictates will ordinarily satisfy the §504 requirement as well. See 34 C.F.R. §104.33(b)(2).

3. "Free" Means Free

Whether due pursuant to IDEA or §504, all special education and related services must be provided at public expense, without cost to child, parent or guardian. 20 U.S.C. §§1401(a)(16),(18), 1413(a)(4)(B)(i); 34 C.F.R. §§300.8(a), 14; 34 C.F.R. 104.33(c). Parents cannot be required to use their child's social security or SSI benefits to fund services owed them under these statutes. McLain v. Smith, 16 EHLR 6 (E.D. Tenn. 1989). School districts may not require a parent to use private health insurance to pay for or defray the cost of special education and/or related services if use of the insurance poses a risk of financial loss to parent or child. Shook v. Gaston County Board of Education, 882 F.2d 119 (4th Cir. 1989), cert. denied, 58 U.S.L.W. 3528 (2/20/90); Seals v. Loftis, 614 F. Supp. 302 (E.D.Tenn. 1985).[9]

B. Content of Individualized Education Program

Once it is determined that a child has a disability and needs special education and related services, a written individualized education program (IEP) must be developed. 20 U.S.C. §1401(20), 1414(a)(5); 34 C.F.R. §300.343. Under IDEA, a school system is not providing a free appropriate public education if it is not following a properly developed IEP. 20 U.S.C. §1401(a)(18)(D); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206 n.27, 102 S.Ct. 3034, 3051 n.27 (1982).[10]

The required IEP must include:

> "...(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in the regular education program, (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when appropriate for the individual, beginning at age 14 or younger),

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[9] Financial loss from the use of insurance might occur in a variety of ways, including a decrease in available lifetime coverage under the policy; a decrease in available annual coverage or any other benefit under the policy; payment of a deductible amount for a particular service; an increase in premiums; discontinuation of the policy; or decreased future insurability with a different insurance company if the educational services for which insurance is used are deemed treatment for a pre-existing medical condition.

[10] Section 504 does not require the development of an IEP. However, the §504 regulations provide that implementation of an IEP developed pursuant to IDEA is one means of providing an "appropriate" education under §504. See 34 C.F.R. §104.33(b)(2).

including, where appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting, (E) the projected date for initiation and anticipated duration of such services and (F) [reevaluation criteria and procedures, discussed above]."

20 U.S.C. §1401(20).[11] In addition, the IEP must be formulated according to the principles of "least restrictive environment." (See discussion below).

. **The IEP must contain a statement of all services needed by the child, not just those which are available within the school system.** See Todd D. v. Andrews, 933 F.2d 1576, 1580-81 (11th Cir. 1991) (district court erred by ordering alteration of IEP goals so that IEP could be implemented at existing placement, rather than ordering school system to provide placement that could implement IEP as written). **The child must then be provided with those services stated in the program, for under both §504 and IDEA, "each handicapped child must be provided all services necessary to meet his/her special education and related needs." Edwin Martin, Chief, Bureau of Education for the Handicapped, U.S. Office of Education, Letter to Chief State School Officers, November, 1977; see also 34 C.F.R. §300.350, concerning the obligation to provide the services listed in the individualized education program.**

Under certain circumstances, local school districts may provide 3 to 5 year olds with an "Individualized Family Service Plan" ("IFSP") instead of an IEP. 20 U.S.C. §1414(a)(5). A local school system's substitution of an IFSP for an IEP must be consistent with state policy, and must be agreed to by the parents. Id. IFSPs for 3-5 year olds must meet the requirements governing IFSPs under the early intervention program for infants and toddlers (birth to age 2) with disabilities created by Part H of IDEA, 20 U.S.C. §1471 et seq. See Pub. L. 102-119, §6, amending 20 U.S.C. §1414(a)(5).[12]

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[11] In the IEP context, the term "transition services" means "a coordinated set of activities for a student, designed with an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation..." 20 U.S.C. §1401(a)(19)

[12] These requirements include a statement of the child's current levels of physical, cognitive, communication, social or emotional, and adaptive development; a statement of the family's resources, priorities and concerns regarding enhancement of the child's development; a statement of the specific early intervention services needed to meet the unique needs of the child and family (including the frequency, intensity and method of service delivery); a description of the natural environments in which services will be appropriately provided; a statement of the major outcomes expected to be achieved, including the methods to be used for assessing progress and determining whether services or goals need to be revised; the starting dates and expected duration of each service; the name of the case manager responsible for implementing and coordinating the plan; and the steps to be taken to transition the child to special education services under Part B of IDEA if such services are appropriate. 20 U.S.C. §1477(a)(d) as amended by Pub. L. 102-119, §14. Early intervention services available under the Part H early intervention program include family training, counseling and home visits; special instruction; speech pathology and audiology; occupational and physical therapy; psychological services; case management services; medical services for diagnosis or evaluation; early identification, screening and assessment services; social work services; vision services; assistive technology devices and assistive technology services; transportation;

C. Effectiveness of the Program in Meeting the Individual's Need

1. IDEA

The Supreme Court has held that a package of special education and related services is "appropriate" within the meaning of IDEA if (1) the IEP was developed in accordance with the procedures set forth in the statute (including those governing resolution of disputes between parents and school systems), and (2) it is "reasonably calculated to enable the child to receive educational benefits." Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 3035 (1982). Subsequent federal court decisions have made it clear that trivial or de minimis benefit does not meet this standard; rather, the IEP must be one "under which educational progress is likely." Board of Education of East Windsor Regional School District v. Diamond, 808 F.2d 987, 991 (3rd Cir. 1986) (emphasis in original).[13]

Rowley does not prohibit states from setting higher quality and benefit standards, and a number of states do so by statute, regulation, judicial decision, or state constitutional provision.[14] Because special education and related services must meet the standards of the state educational agency, where a higher state quality standard exists, it is automatically "incorporated" into IDEA. Town of Burlington, 736 F.2d 773, 789 (1st. Cir. 1984), aff'd on other grounds, 471 U.S. 359 (1985).[15] In these states an education meeting the higher

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and health services necessary to enable the child to benefit from the early intervention programming. See 20 U.S.C. §1472(2) as amended by Pub. L. 102-119, §14.

[13] See also Cordrey v. Euckert, 917 F.2d 1460, 1473 (6th Cir. 1990), cert. denied, 111 S. Ct. 1391 (1991) (child must benefit meaningfully within his or her potential); Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989), cert. denied, 110 S. Ct. 730 (1990) (benefit must be more than de minimis); Polk v. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3rd Cir.), cert. denied 109 S.Ct. 838 (1988) (de minimis or trivial benefit insufficient; whether benefit is de minimis must be gauged in relation to child's potential); Hall v. Vance County Board of Education, 774 F. 2d 629, 636 (4th Cir. 1985) ("[c]learly, Congress did not intend that a school system could discharge its duty...by providing a program that produces some minimal academic advancement, no matter how trivial"; Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 618 (E.D. Penn. 1991) (educational program must be sufficient for student to make "meaningful educational progress"); Chris D. v. Montgomery County Board of Education, 743 F.Supp. 1524, 1531 (M.D. Ala. 1990)(rejecting implicit school board contention that "a benefit is conferred anytime a student is not left to vegetate"); cf. Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1158 (5th Cir. 1986).

[14] Massachusetts, for example, requires educational services designed to benefit a child with disabilities "to the maximum extent feasible." Mass. Gen. Laws c. 71B, §3.

[15] See also Johnson v. Independent School District No. 4, 921 F.2d 1022, 1029 (10th Cir. 1990), cert. denied, 59 U.S.L.W. 3741 (1991); Thomas v. Cincinnati Board of Education, 918 F.2d 618, 620 (6th Cir. 1990); Geis v. Board of Education of Persippany-Troy Hills, 774 F.2d 575, 581 (3rd Cir. 1985); Students of California School for the Blind v. Honig, 736 F.2d 538, 544-545 (9th Cir. 1984), vacated as moot, 471 U.S. 148, 105 S.Ct. 1928; Pink v. Mt. Diablo Unified School District, 738 F. Supp. 345, 346-347 (N.D.Cal. 1990); Barwacz v.

state quality standard is an IDEA right, and IDEA compliance may thus require IEPs designed to maximize potential or otherwise exceed the Rowley benefit standard.

2. §504

Because §504 is an antidiscrimination statute, the regulations address educational quality by reference to the quality of services provided to non-disabled students. For purposes of §504,

> "...an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based on adherence to procedures that satisfy the requirements of [the §504 regulations regarding evaluations, least restrictive environment and procedural safeguards]."

34 C.F.R. §104.33.

The regulations also provide that it is illegal for recipients to afford a disabled student an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others, or to provide a disabled student with an aid, benefit or service that is not as effective as that provided to others. 34 C.F.R. §104.4(b)(ii)-(iii). In addition, any facility that is identifiable as being for students with disabilities must be comparable--physically as well as in regard to the quality of services and activities conducted there--to facilities for non-disabled students. 34 C.F.R. §104.34(c); see also 34 C.F.R. §300.231 (regarding IDEA).

D. Least Restrictive Environment/Maximum Appropriate Integration/Mainstreaming

Both IDEA and §504 guarantee children with disabilities the right to participate in regular classroom and extra-curricular activities with non-disabled students to the maximum extent appropriate in view of their individual needs, with the use of supplementary aids and services and/or modification of the regular education curriculum if necessary. IDEA addresses this right in 20 U.S.C. §§1412(5)(B) and 1414(a)(1)(C)(iv); see also 34 C.F.R. §§300.132, 300.227, and 300.550-556. The right applies to the full range of academic program options, nonacademic services, extracurricular activities, and physical education. 34 C.F.R. §§300.303-307.

A school district proposing to remove a child from the mainstream bears the burden of proving that such an exclusion from the regular education setting--whether total or partial--is justifiable in view of these requirements. Oberti v. Bd. of Ed. of Borough of Clementon Schl. Dist., 995 F.2d 1204 (3rd Cir. 1993); Tokarcik v. Forest Hills School District, 665 F.2d 443, 458 (3rd Cir. 1981), cert. denied, 458 U.S. 1121; Davis v. District of Columbia Board of Education, 530 F. Supp. 1209, 1211-1212 (D.D.C. 1982); Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866, 880-881 (D.D.C. 1972); 34 C.F.R. §104.34(a). IDEA "does not permit states to make mere token gestures to accommodate handicapped students [in regular education classrooms]; its requirement for modifying and supplementing regular education is broad." Daniel R.R. v. State Board of

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Michigan Department of Education, 674 F. Supp. 1296, 1303-1304 (W.D.Mich. 1987).

Education, 874 F.2d 1036, 1048 (5th Cir. 1989); see also Oberti.

"[T]he decision as to whether any particular child should be educated in a regular classroom setting...is necessarily an inquiry into the needs and abilities of one child, and does not extend to a group or category of handicapped children..." Board of Education of Sacramento City Unified School District v. Holland, 786 F. Supp. 874, 878, aff'd., 14 F.3d 1398 (9th Cir. 1994).[16] "[B]efore the school district may conclude that a handicapped child should be educated outside the regular classroom, it must consider...the whole range of supplemental aids and services...for which it is obligated under [IDEA] and the regulations promulgated thereunder to make provision." Greer v. Rome City School District, 950 F.2d 688, 696 (11th Cir. 1991), opinion withdrawn, 956 F. 2d 1025 (11th Cir. 1992), reinstated, 967 F.2d 470 (11th Cir. 1992). Only when the child's education cannot be achieved satisfactorily in the regular education class room with one or more of such supplementary aids and services may s/he be placed in another setting. Id. Consideration of these issues must occur "prior to and during the development of the IEP." Id.

Similar rights are established under §504 by 34 C.F.R. §§104.34, §104.37. For instance, §104.34(a) states that handicapped persons shall be educated with non-handicapped persons "to the maximum extent appropriate" and shall be placed in the regular program "unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."

In addition to these specific provisions concerning elementary and secondary education, the §504 regulations state more generally that

> "(1) A recipient...may not...on the basis of handicap:
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> * * *
>
> (iv) Provide different or separate aid, benefits, or service to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others; *** (3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different."

34 C.F.R. §104.4(b).

Courts have recognized mainstreaming rights under the Constitution, see, e.g. Mills, supra, the federal laws, and/or state law. In Hairston v. Drosick, 425 F. Supp. 180 (S.D. W.Va. 1976), for example, the court found:

> "It is an educational fact that the maximum benefits to a child are received by placement in as normal an environment as possible. ...A child

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[16] See also Daniel R.R., 874 F.2d at 1048 (LRE analysis is "an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the school's response to the child's needs").

> has to interact in a social way with its peers and denial of this opportunity during his minor years imposes added lifetime burdens upon a handicapped individual."

Id. at 183-84. The court went on to hold that exclusion of a child with disabilities from a regular classroom situation, except as a last resort in situations in which educational needs cannot be met within that classroom, violates both §504 and the IDEA.

The least restrictive environment/maximum appropriate integration requirement also protects children whose needs cannot be met in regular education classes from overly restrictive and isolated placements. Thus, for example, IDEA and §504 integration requirements would be violated if a child who could be educated appropriately in a special education classroom within a "regular" education elementary school were nonetheless placed in a segregated school for children with disabilities. See, e.g., Roncker v. Walter, 700 F.2d 1058 (6th Cir 1983), cert. denied, 464 U.S. 864, 104 S.Ct. 196.[17]

E. Full Educational Opportunity

In addition to specific requirements regarding the provision of a free appropriate public education, IDEA and its regulations require state and local implementation of plans to provide full educational opportunity to all children with disabilities aged birth through twenty-one. See 20 U.S.C. §1412(2)(A); §1414(a)(1)(C); 34 C.F.R. §300.123, §300.222, §300.304.

Section 504, by the terms of the statute, forbids discrimination against students with disabilities; the regulations include the following among the types of discrimination which are prohibited:

> "(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; *** (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. *** (4) A recipient may not...utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the

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[17] For additional decisions addressing various aspects of the least restrictive environment and inclusion see, e.g., Schuldt v. Mankato School District No. 77, 937 F.2d 1357 (8th Cir. 1991); Barnett v. Fairfax County School Board, 927 146 (4th Cir. 1991); Lachman v. Illinois Board of Education, 852 F.2d 290 (7th Cir. 1988); Hawaii State Department of Education v. Katherine D., 727 F.2d 809 (9th Cir. 1983); Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y. 1994); Statum v. Birmingham Pub. Sch. Bd. of Ed., 20 IDELR [Individuals with Disabilities Education Law Report] 435 (N.D. Ala. 1993); Bonadonna v. Cooperman, 619 F.Supp. 401 (D.N.J. 1985); Springdale School District v. Grace, 494 F.Supp. 266 (W.D. Ark. 1980), aff'd. 656 F.2d 800 (8th Cir. 1981), vacated and remanded for further consideration, 458 U.S. 1118 (1982), aff'd., 693 F.2d 41, cert. denied, 461 U.S. 927 (1983).

objectives of the recipient's program with respect to handicapped person, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State. (5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits form Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons."

34 C.F.R. §104.4(b).

In addition, both the IDEA and §504 regulations set forth specific requirements regarding equal opportunity for participation in a variety of school programs (such as art, music, industrial arts, consumer and homemaking education, and vocational education), nonacademic services, and physical education. See 34 C.F.R. §300.305-.307 (implementing IDEA); 34 C.F.R. §§104.34(c) and 104.37 (implementing §504).

F. IEP Development and Parental Participation

IEPs must be developed at meetings attended by the child's teacher, another representative of the school system who is qualified to provide or supervise the provision of special education, one or both parents, the child "where appropriate," other individuals at the discretion of the parent or system, and, following initial evaluations, a member of the evaluation team and a person knowledgeable about the evaluation procedures and results. 20 U.S.C. §1401(20), 34 C.F.R. §300.344. The school system must take several steps to insure parent presence, including proper notification, agreement on scheduling, alternative means of participation, and actions to insure that the parent understands the proceedings, including provision of a translator or sign language interpreter when necessary. 34 C.F.R. §300.345; see also Rothschild v. Grottenthaler, 907 F. 2d 286 (2nd Cir. 1990 (school district must provide parents with sign-language interpreter for school-initiated meetings concerning academic or disciplinary progress of their children). Parents also have the right under IDEA to tape record IEP meetings. E.H. v. Tirozzi, 735 F. Supp. 53 (D. Conn. 1990); V.W. v. Favolise, 131 F.R.D. 654 (D. Conn. 1990).

Once a child's needs have been identified and appropriate services, goals and objectives identified through the IEP process, a placement capable of providing those services and achieving those goals and objectives can be selected. Placement decisions must be based upon the IEP. 34 C.F.R. §300.552(a)(2). This means that the IEP must be developed before a placement is chosen. Spielberg v. Henrico County Public Schools, 853 F.2d 256, 259 (4th Cir. 1988); 34 C.F.R. part 300, App. C, para. 5. A school system violates IDEA if it writes an IEP to fit a placement it has already selected. Spielberg, 853 F.2d at 259; c.f. Todd D., 933 F.2d at 1580-81 (district court erred by ordering alteration of IEP goals so that IEP could be implemented at existing placement, rather than ordering school system to provide placement capable of implementing IEP as written).

During the evaluation and placement process, parental rights of access to all education records are protected by 20 U.S.C. §1415(b)(1)(A); 34 C.F.R. §300.502, §300.530-534; 34 C.F.R. §104.36. The parent is specifically entitled to a copy of the IEP under 34 C.F.R. §300.345(f).

IDEA also provides for selection of "surrogate parents" when no parent can be identified or located or when the child is a ward of the state. 20 U.S.C. §1415(b)(1)(C); 34 C.F.R. §300.514.

G. Notice and Consent for Placement Changes

Under IDEA, parents must receive written notice before a school system proposes to change, or refuses to change, a child's educational placement. 20 U.S.C. §1415(b)(1)(C),(D); 34 C.F.R. §300.504(a). The §504 regulations also require notice to parents of "...actions regarding...educational placement..." 34 C.F.R. §104.36. IDEA additionally requires school systems to obtain parental consent before initial placement in a program providing special education and related services. 34 C.F.R. §300.504(b)(1)(ii). Consent is defined at 34 C.F.R. §300.500. Procedures for when the parent refuses to consent are found at 34 C.F.R. §300.504(c).

V. Parent Challenges to School Decisions

A. Notice

Parents must be notified within a reasonable time before the school proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or placement of a child with disabilities or the provision of a free appropriate education to the child. 20 U.S.C. §1415(b)(1)(C); 34 C.F.R. §300.504(a); see also 34 C.F.R. §104.36 (regarding §504 notice requirements). IDEA notice must contain a full explanation of all procedural rights available to parents; a description of the proposed or refused action, including an explanation for the school's decision; a description of other options considered, along with an explanation of why these options were rejected; and a description of each evaluation procedure, test, report or other factor relied upon in making the decision in question. 34 C.F.R. §300.505. The notice must be written in understandable language, and in the parent's native language unless clearly not feasible; and steps must be taken to insure that notice is effectively communicated where the parent's mode of communication is not a written language. 20 U.S.C. §1415(b)(1)(D); 34 C.F.R. §300.505.

If the school district is initiating a hearing, it must also inform the parent of any free or low-cost legal and other relevant services available. 34 C.F.R. §300.506(c).

B. Complaint

Under IDEA, a parent is entitled to complain "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(1)(E). The §504 regulations also provide for parent complaints. See 34 C.F.R. §104.36. Filing a complaint under these statutory and regulatory provisions triggers the hearing rights described below.[18]

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[18] Parents and others believing IDEA or §504 rights have been violated may take advantage of two other administrative complaint mechanisms, neither of which afford hearing rights. First, the regional offices of the U.S. Department of Education/Office of Civil Rights investigate complaints alleging violations of §504. For the pertinent regulations, see 34 C.F.R. §104.61, incorporating by reference 34 C.F.R. §§100.6-100.10. Second, state

C. Hearing

IDEA entitles a parent to an impartial due process hearing concerning any complaint or, alternatively, concerning any proposal to initiate or change, or refusal to initiate or change, the identification, evaluation, or placement of the child or the provision of a free appropriate public education under IDEA. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.506(a). The §504 regulations also require a hearing system. See 34 C.F.R. §104.36.

Depending upon state law, IDEA hearings may be conducted by either the state education agency or by the public agency directly responsible for the child's education. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.506(b). There must be an impartial hearing officer who is not an employee (or a board member) of the public agency involved in the child's education and who does not have any conflicting interests. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.507; see also H.E.W., "Nondiscrimination in Federally Assisted Programs: Policy Interpretation No. 6" (under §504), 43 Fed. Reg. 36034 (August 14, 1978) (school board members may not serve as hearing officers).

At IDEA hearings, the parties have the right to (1) be accompanied and advised by counsel and by individuals with special knowledge or training; (2) present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) prohibit the introduction of any evidence not disclosed at least five days before the hearing; (4) to obtain a record; and (5) to obtain written findings and decisions. 20 U.S.C. §1415(d); 34 C.F.R. §300.508. Parents have the right to have the child present and to make the hearing public. 20 U.S.C. §1415(d); 34 C.F.R. §300.508.

Furthermore, parents are entitled to access to all education records in preparing for and during the hearing and appeals process, to the same extent as noted in the discussion of the IEP meeting, supra. The hearing must be conducted at a time and place reasonably convenient to parents and child. 34 C.F.R. §300.512(d).

A copy of the final decision must be mailed to the parties within 45 days after receipt of a request for a hearing unless a specific extension is granted. 34 C.F.R. §300.512.

D. Appeal/Impartial Review

If the initial IDEA hearing was not conducted by the state education agency, any aggrieved party can appeal the decision to that state agency. In conducting an impartial review, the state must (1) examine the entire hearing record; (2) insure compliance with due process; (3) conduct a hearing in accordance with the procedure above if additional evidence is necessary; (4) provide opportunity for oral or written argument; and (5) make an independent decision, with written findings provided to the parties. 20 U.S.C. §1415(c); 34

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education agencies must adopt written procedures for resolving complaints alleging that a public agency has violated IDEA or the regulations implementing it. State complaint procedures must meet requirements set forth in the IDEA regulations at 34 C.F.R. §§300.600-300.662. Such complaints were formerly known as EDGAR complaints, before the pertinent regulations were deleted from the Education Department General Administrative Regulations at 34 C.F.R. §76.780 et seq., modified, and moved to the IDEA regulations in 1992.

C.F.R. §300.510; see also 34 C.F.R. §104.36 (regarding §504 requirements). Parties may be represented by counsel. Comment to 34 C.F.R. §300.510. The review must be conducted at a time and place reasonably convenient to parents and students. 34 C.F.R. §300.512(d). Copies of the final decision must be mailed to parties within 30 days of the request for review, unless the reviewing officer grants a specific extension. 34 C.F.R. §300.512.

E. Civil Action

IDEA provides that a party aggrieved by a hearing decision (when the hearing was conducted at the state level and there is thus no right of impartial review) or aggrieved by an impartial review decision may sue by bringing a civil action in any state court of competent jurisdiction or in a federal district court. 20 U.S.C. §1412(e)(2); 34 C.F.R. §300.511.

F. Child's Placement Status During Administrative and Judicial Proceedings

Once the parent initiates a complaint under IDEA, the child's placement status is protected through any hearing and appeals or judicial proceedings: the child remains in his or her present placement, unless the parents and the State or local education agency agree otherwise. 20 U.S.C. §1415(e)(3); 34 C.F.R. §300.513. If the complaint involves initial admission to school, the child, with parental consent, must be placed in the public school program until all administrative and judicial proceedings are completed. 20 U.S.C. §1415(e)(3); 34 C.F.R. §300.513.

Where a parent prevails at the hearing or, where relevant, impartial review level, the favorable placement decision should be deemed an agreement between the parents and the State within the meaning of 20 U.S.C. §1415(e)(3). The placement thus can and should be implemented at public expense even if the school system appeals the decision to a court. See Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990); Grace B. v. Lexington School Committee, 762 F. Supp. 416 (D. Mass. 1991); Kantak v. Liverpool Central School District, 16 EHLR 643 (N.D.N.Y. 1990); Department of Education of Hawaii v. Mr. and Mrs. S., 632 F. Supp. 1268 (D. Hawaii 1986); Blazejewski v. Board of Education of Allegany Central School District, 560 F. Supp. 701 (W.D.N.Y. 1983).

G. Remedies

IDEA permits courts to order such relief as is "appropriate" in special education cases. 20 U.S.C. §1415(e)(2).[19] Similarly, §504 entitles students who successfully pursue their rights under this statute to a variety of remedies as relief for having suffered discrimination. Due process hearing officers and courts can order a school system to take any number of actions in order to correct violations of IDEA and §504, including modifying an IEP, implementing an existing IEP it has failed to carry out, providing a particular placement, providing a particular related service(s), etc. In addition, compensatory education and reimbursement for special education and related services paid for by parents are available remedies under proper circumstances. Damages may also be available in IDEA and/or §504 cases.

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[19] The statute does not define "appropriate."

1. Reimbursement

The Supreme Court approved retroactive reimbursement as an IDEA remedy in School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 105 S. Ct. 1996 (1985). In that case, the court ruled that "appropriate" relief under IDEA can include an order requiring a local school district to reimburse parents for the cost of obtaining an appropriate education when the school system has failed to provide a free appropriate public education meeting IDEA standards. Id., 471 U.S. at 370, 105 S. Ct. at 2003. School systems should ordinarily be ordered to reimburse parents for such costs unless "equitable considerations" would make such an order unfair under the circumstances of the case. Id. See also Florence County School District Four v. Carter, 114 S.Ct. 361 (1994).

Parents need not precisely replicate the placement a school district should have provided; parents may receive reimbursement for the costs incurred in providing special education or related services so long as these educational services meet the standard of "appropriateness" established by IDEA. Carter, supra; see also Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1161 (5th Cir. 1986) (program in which parent enrolled child, "although it might not have been adequate under the EAHCA, was better than no summer program at all...Burlington rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act"); see also Garland Independent School District v. Wilks, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (low income parent was entitled to reimbursement for furnishing those services intended, to the extent she could afford, to create a "facsimile" of the residential placement ultimately ordered by the court).

2. Compensatory Education

Since the Supreme Court's decision in Burlington, courts have consistently held that compensatory education--meaning additional special education and/or related services to make up for the time during which a school system failed to provide a free appropriate public education--is also an appropriate remedy under IDEA.[20] Comparing compensatory education to the reimbursement approved in Burlington, these courts have recognized that without compensatory education, students whose parents lack the resources to place them in private

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[20] See, e.g., Pihl v. Massachusetts Dept. of Ed., 9 F3d. 184 (1st Cir. 1993); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 111 S. Ct. 1317 (1991); Burr v. Sobol, 863 F.2d 1071 (2nd Cir. 1989), vacated and remanded, 109 S. Ct. 3209 (1989), on remand, aff'd. per curiam, 888 F.2d 258 (2nd Cir. 1989), cert. denied 58 U.S.L.W. 3545 (2/27/90); Jefferson County Board of Education v. Breen, 853 F.2d 853 (11th Cir. 1988); Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986); see also Jackson v. Franklin County School Board, 806 F.2d 632,631 (5th Cir. 1986) (on remand "...the district court must determine what damages, either monetary, or in the form of remedial education services...would be appropriate at this time"). But see Alexopulos v. Riles, 784 F.2d 1408, 1412-13 (9th Cir. 1986) (in dicta, characterizing 26-year-old plaintiff's request for compensatory education as an improper request that IDEA (then the EAHCA) age limitations be waived. For two pre-Burlington cases awarding compensatory education, see Max M. v. Thompson, 592 F. Supp. 1450 (N.D. Ill. 1984); Campbell v. Tallageda County Board of Education, 518 F. Supp. 47 (N.D. Ala. 1981).

programs and seek reimbursement have no way to vindicate their IDEA rights.[21] Compensatory education should therefore be available whenever necessary to secure the right to a free appropriate public education.

Although most reported judicial decisions awarding compensatory education have done so under IDEA, the remedy should be available under §504 as well. See Mrs. C. v. Wheaton, 916 F. 2d 69, 75 (2nd Cir. 1990).

3. Damages

Courts have not yet definitively addressed the issue of whether damages (other than reimbursement or compensatory education) are available for violations of IDEA rights. While some courts have stated that IDEA does not authorize damages in any circumstances, others have left open the possibility of damages under "exceptional" or "egregious" circumstances.[22]

Even if damages are not available under IDEA in and of itself, damages should be available if IDEA is linked with 42 U.S.C. §1983, which allows an individual who has been deprived of rights granted by a federal statute to bring an action for damages under certain circumstances. Prior to 1986 a number of judicial decisions, including the Supreme Court's decision in Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457 (1984), held or suggested that a §1983 action could not be brought to vindicate the substantive IDEA right to a free appropriate public education because IDEA was the exclusive avenue for such claims. The latter is no longer the case, however. The Handicapped Children's Protection Act of 1986 effectively reversed Smith, amending IDEA to explicitly provide that IDEA does not limit the rights or remedies available under the Constitution, §504 or other federal statutes protecting the rights of children and youth with disabilities. See 20 U.S.C. §1415(f).

It should also be possible to bring a damage claim for violation of §504 rights by linking §1983 with particular §504 regulations. Although the courts have yet to definitively address the issue, damages should also be available under §504 directly, independently of

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[21] See, e.g., Meiner, 800 F.2d at 753; Breen, 853 F.2d at 857-58; Burr, 863 F.2d at 1078.

[22] See Manecke v. School Board of Pinellas County, 762 F.2d 912, 915-16 at n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); Department of Education v. Katherine D., 727 F.2d 809, 816-17 (9th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Marvin H. v. Austin Independent School District, 714 F.2d 1348, 1356 (5th Cir. 1983); Barwacz v. Michigan Department of Education, 674 F. Supp. 1296, 1307 (W.D. Mich. 1987); Geriasimou v. Ambach, 636 F. Supp. 1504, 1512 (E.D.N.Y. 1986); Hudson v. Wilson, 1986-87 EHLR DEC. 558:186, :190-91 (W.D. Va. 1986); Campbell, supra, 518 F. Supp. at 57; White v. California, 195 Cal. App. 3d 452 (1987); see also Jackson v. Franklin County School Board, 806 F.2d 623,631-32 (5th Cir. 1986) (remanding for a determination of damages, "either monetary or in the form of remedial education services," after holding that school officials had violated student's "due process rights, as contemplated by the Fourteenth Amendment and as specifically enumerated by the EHA").

§1983.[23]

H. Attorneys Fees

Parents who prevail in IDEA disputes may recover reasonable attorneys fees (at prevailing market rates) and costs, subject to certain conditions. 20 U.S.C. §1415(e)(4). Attorneys fees are available for parents who prevail in administrative due process hearings (with no subsequent appeal to court) as well as for those who prevail in court. See, e.g., Moore v. D.C. Board of Education, 907 F.2d 165 (D.C. Cir.), vacating 886 F.2d 335, cert. denied, 111 S. Ct. 556 (1990); McSomebodies v. Burlington Elementary and Secondary School District, 886 F.2d 1558 (9th Cir. 1988), supplemented March 2, 2990, 897 F.2d 974; Mitten v. Muscogee County School District, 877 F.2d 932 (11th Cir. 1989), cert. denied, 110 S. Ct. 1117 (1990); Duane M. v. Orleans Parish School Board, 861 F.2d 115 (5th Cir. 1988); Eggers v. Bullitt County School District, 854 F.2d 892 (6th Cir. 1988). Fees are also recoverable for work done in settling IDEA disputes prior to a due process hearing. See, e.g., Barlow-Gresham Union High School District No.2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991); Shelly C. v. Venus Independent School District, 878 F.2d 862 (5th Cir. 1989), cert. denied, 110 S. Ct. 729 (1990); Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988); Rossi v. Gosling, 696 F. Supp. 1079 (E.D. Va. 1988).

Apart from IDEA fee provisions, parties who prevail in court on §504 claims may also be awarded attorneys fees. 29 U.S.C. §794a(b).

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[23] 29 U.S.C. §794a(a)(2) provides that "[t]he remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 [which bars discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance]...shall be available to any person" aggrieved by violations of §504. Title IX of the Education Amendments of 1972, which bars gender discrimination in education programs receiving federal funds, similarly incorporates Title VI remedies. The Supreme Court recently held in Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992) that damages are available to remedy Title IX violations.